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## The Rise of Force Majeure amid Coronavirus Pandemic: Legitimacy and Implications for Energy Laws and Contracts

Cosmos Nike Nwedu  
*Federal University Ndufu-Alike Ikwo*

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## THE RISE OF FORCE MAJEURE AMID THE CORONAVIRUS PANDEMIC: LEGITIMACY AND IMPLICATIONS FOR ENERGY LAWS AND CONTRACTS

### ABSTRACT

*The global outbreak of coronavirus disease has become one of humanity's greatest challenges and may arguably surpass climate change in the short-term. The virus's rapid dispersion through the transportation sector, as well as its disruption to human health and global economies, has been remarkable. The energy sector has also been impacted, as it has seen episodic low prices of oil, particularly in April 2020. This scenario is due to less demand for oil amid various containment measures and related health policies of governments worldwide. The performance of existing oil and gas contracts, especially time-bound supply contracts, has been rendered impracticable in some parts of the world. This has resulted in parties invoking force majeure clauses as an excuse. However, the legitimacy of coronavirus as an acceptable force majeure has emerged controversial. This article, adopting an analytical approach, makes a case for coronavirus as a typical instance of force majeure for energy contracts or sales and purchase agreements ("SPAs"), such as liquefied natural gas ("LNG") contracts and energy purchase agreements ("EPAs"), which can only avail defense depending on parties' contractual force majeure provisions. This article offers an understanding of force majeure alongside required fundamentals. Likewise, it highlights current debates about force majeure and likely impacts on future energy law contracts.*

### I. INTRODUCTION

The ongoing global transmission of a deadly disease caused by severe acute respiratory syndrome-related coronavirus 2 (SARS-CoV-2)<sup>1</sup> has increasingly

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\*Cosmos Nike Nwedu is a researcher and lecturer in law at the Faculty of Law, Federal University Ndufu-Alike Ikwo, and also currently in a private legal practice at the law firm of U.M. Usulor & Co., Abakaliki, Ebonyi State, Nigeria.

1. Feng He et al., Coronavirus disease 2019: What we know? 92 J. Med. Virol. 719 (2020); Cynthia Liu et al., Research and Development on Therapeutic Agents and Vaccines for COVID-19 and Related Human Coronavirus Diseases, 6 ACS Cent. Sci. 315 (2020). SARS-CoV-2 originated from a large family

become one of humanity's greatest challenges to date. This virus arguably surpasses global climate change in all ramifications, as long as it endures. The World Health Organization ("WHO") has maintained that SARS-CoV-2 was not known to humanity before appearing in Wuhan, China.<sup>2</sup> Therefore, the WHO recognized its novelty with an initial codename "2019-n-CoV," which literally depicts a novel coronavirus disease of 2019 origin. The n-CoV was re-codenamed "COVID-19" and declared a pandemic by the WHO on March 11, 2020.<sup>3</sup> There have been almost unbearable transformations in all aspects of human life,<sup>4</sup> visible infliction of great shocks on human wellbeing, and disruptions in economic and commercial activities worldwide.<sup>5</sup> The impacts of the pandemic signify a grave challenge to both human health and the global investment landscape.<sup>6</sup>

The energy sector has faced severe financial crisis, as oil prices dipped below \$0 on April 20, 2020.<sup>7</sup> This dip was caused by low demand for crude oil, as key energy-consuming economic and industrial sectors were halted. Rapid progressive impacts of COVID-19 have created a situation in which energy-contracting parties are no longer able to meet predetermined as a result of government containment responses.<sup>8</sup> Generally, lockdown orders have affected routine operations of critical infrastructure, such as ports, terminals, and supply chains. Additionally, financial institutions, learning and research institutions have all been affected. Moreover, contractual concerns have arisen. These concerns are mainly due to the performance of existing oil and gas contracts, especially time-bound supply contracts, has become impracticable. There is speculation that contracts for shipping and delivery, manufacturing, supply chains, and contracts

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of coronaviruses. The virus is believed to have originated in the wet animal market in Wuhan, China, in early December 2019.

2. WHO, *Q&A on coronaviruses (COVID-19)- What is COVID-19*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/questions-and-answers/hub/q-a-detail/q-a-coronaviruses> (last visited Oct. 12, 2020).

3. See *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION (WHO), (March 11, 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. (Following a seemingly series of speculations marked by a visible daily worldwide increase of contagion and resultant dead tolls from COVID-19, the WHO declared it a pandemic.)

4. See generally Danny Horesh & Adam D. Brown, *Traumatic stress in the age of COVID-19: A call to close clinical gaps and adapt to new realities*, 12 PSYCHOL. TRAUMA: THEORY, RESEARCH, PRACTICE, AND POLICY 331 (2020).

5. WHO, *supra* note 3.

6. L. Clover Alcolea, *The COVID-19 Crisis: Core Investment Issues Revisited*, TRANSNATIONAL DISPUTE MANAGEMENT (TDM) (May 25, 2020), <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1822>.

7. *Oil Plunges Below Zero for First Time in Unprecedented Wipeout*, BLOOMBERG LAW, (April 20, 2020), <https://news.bloomberglaw.com/environment-and-energy/oil-plunges-below-zero-for-first-time-in-unprecedented-wipeout>.

8. Michael Wray et.al., *The COVID-19 Pandemic and the Contractual Force Majeure Landscape*, HOLMAN FENWICK WILLIAM, (2020) [hereinafter HWF] <https://www.hfw.com/The-COVID-19-Pandemic-and-the-Contractual-Force-Majeure-Landscape>.

requiring urgent delivery will be impacted.<sup>9</sup> The bad news is that such contracts are already being affected,<sup>10</sup> resulting in contracting parties invoking *force majeure* clauses.

There have been contradictory debates as to whether COVID-19 is an acceptable use of *force majeure*. These debates, while unsettled, portend great implications for some sort of future energy laws and energy contracts. The reality, however, is that contracting parties in efforts to establish a defense against the inability to perform contractual obligations, or perhaps terminate such existing contracts, will certainly make *force majeure* more crucially recognized. This possibility will also unsurprisingly broaden an understanding of the concept. Though COVID-19 has had remarkable impacts on human lives and businesses, if it is not well contained there is the possibility of experiencing its post-pandemic wide-ranging implications on the global economy.<sup>11</sup> Therefore, whether socio-economic impacts of the pandemic are short-term or long-term depends on timing of containment.

This article has been necessitated amid controversies concerning whether COVID-19 constitutes a legitimate excuse for *force majeure* in some existing oil and gas contracts. The rationale is to make a case for COVID-19, as a supervening instance of *force majeure*, and a legitimate defense depends on whether contracting parties had provided a pandemic-related *force majeure* clause in their existing energy contracts or sale and purchase agreements (“SPAs”), such as liquefied natural gas (“LNG”) contracts, energy purchase agreements (“EPA”), or power purchase agreement (“PPA”). This article is comprised of three sections to address *force majeure* clauses in the energy sector. The first section offers an age-long philosophical underpinning and the essential elements of *force majeure*. The second section highlights current debates about *force majeure*. The third section suggests likely future implications of *force majeure* for energy laws and energy contracts, exploring both implied legal and financial elements. Finally, a brief conclusion is drawn.

## II. THE PHILOSOPHY OF FORCE MAJEURE AND ITS FUNDAMENTALS

### A. Understanding force majeure

The principle of *force majeure* can be seen to have evolved in England in the case of *Taylor v. Caldwell*.<sup>12</sup> Though it has so far been recognized within maritime and state laws,<sup>13</sup> *force majeure* is relatively applicable to different legal systems and may not be automatic under the common law, but contract-based *force majeure* needs to be claimed by contractual parties. Currently, it is widely tailored to

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9. Tom Sullivan, *Is COVID-19 an Excuse for Your Performance*, MONDAQ, (Apr. 2, 2020), <https://www.mondaq.com/unitedstates/litigation-contracts-and-force-majeure/910002/is-covid-19-an-excuse-for-your-performance>.

10. See Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020).

11. Liu et al., *supra* note 1 at 315.

12. (1863) 122 ER 309, EWHC QB J1.

13. HFW, *supra* note 7.

typical contracts, especially in energy contracts,<sup>14</sup> such as LNG SPAs.<sup>15</sup> There is no definite or globally acceptable definition of *force majeure*, in which case varying definitions have enmeshed. This reason makes it difficult to argue what a standard *force majeure* clause entails, both in principle and practice.

On a basic level, *force majeure* has been defined as unanticipated external conditions that obstruct contract performance.<sup>16</sup> The Canada Supreme Court in *Atlantic Paper Stock Ltd v. St. Anne-Nackawic* advanced an ideal meaning of *force majeure* as an Act of God, which “ . . . generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.”<sup>17</sup> Therefore, *force majeure* is a contractual clause by which contracting parties mutually agree to be relieved from delay or the inability to perform specific time-bound obligations should any unusual, significant, and controversial eventual acts or circumstances reasonably far from human imagination occur.

The scope of *force majeure* is never exhaustive, as events such as COVID-19 will always push its frontier. To that extent, disputes regarding the operation and scope of *force majeure* are commonly possible.<sup>18</sup> In essence, contracts normally stipulate cases to be measured contextually as *force majeure*. Fundamentally, a *force majeure* event is at the centrality of Acts of God because of its most often superior force or obvious reasonable insensibility, inconceivability, and supernaturalism. However, some *force majeure* events can be human induced, including governmental actions. The former often includes earthquakes, hurricanes, epidemics, and similar events, whereas the latter involves war, policies, and regulations, which sometimes can be consequent upon Acts of God. For example, government responses to Acts of God, such as a pandemic, can result in preventive measures capable of impeding the performance of existing contractual obligations among parties.

Without much inquiry, the mere mention of “Act of God” or “governmental action” is simply nebulous, or in fact lacks preciseness. Thus, such a clause provision will not prevail in light of the current realities in the contractual world. This issue arose in the case of *British Electrical and Associated Industries (Cardiff) Ltd v.*

14. Joni R. Paulus & Dirk J. Meeuwig, *Force Majeure: Beyond Boilerplate*, 37 ALBERTA L. REV. 302 (1999).

15. LNG Sale and Purchase Agreement Between Sabine Pass Liquefaction, LLC and Korea Gas Corporation (Jan. 30, 2012), <https://www.sec.gov/Archives/edgar/data/1383650/000138365012000009/exhibit101kogasspa.html>; Acknowledgement of Long-Term LNG Sale and Purchase Agreement Between Qatar Liquefied Gas Co. Ltd. and Pakistan State Oil Co. Ltd (Feb. 10, 2016), [https://psopk.com/files/home/use\\_full\\_links/qg\\_executed\\_redacted\\_version.pdf](https://psopk.com/files/home/use_full_links/qg_executed_redacted_version.pdf).

(Demonstrating respectively, typical examples of *force majeure* clauses in clauses 14 and 18).

16. Agnieszka Ason & Michal Meidan, *Force majeure notices from Chinese LNG buyers: prelude to a renegotiation?* OIES, U. OF OXFORD, <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2020/03/Force-majeur-notices-from-Chinese-LNG-buyers-prelude-to-a-renegotiation.pdf> (last visited Nov 1, 2020).

17. *Atl. Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Co. Ltd.* (1975), [1976] 1 S.C.R. 580 at 583 (Can.).

18. Ason & Meidan, *supra* note 16.

*Patley Pressings Ltd.*<sup>19</sup> There is no protest that contractual clauses with specific precipitating events (for example, “epidemic,” “pandemic,” “outbreak of diseases,” and “government policies or regulations”) may have a better prospect to succeed.<sup>20</sup> However, one crucial question is: when is a governmental policy or regulation tantamount to *force majeure*? This concern seems to have received a precedent in *North Ill. Gas Co. v. Energy Coop., Inc.*,<sup>21</sup> as the court held that a governmental order assumes a *force majeure* level if it obviously expresses an act, which closely impedes performance or triggers the breach of a contract.<sup>22</sup> The ongoing COVID-19 pandemic is an example. Therefore, Acts of God and human acts can be argued as two kinds of *force majeure*.

There are remarkably, relatively different approaches to understanding what *force majeure* events mean in different jurisdictions. The context of common law practice is rarely characterized with a general definition of the concept.<sup>23</sup> Contextually, an understanding of *force majeure* may depend on existing national laws. The case of *Route 6 Outparcels, LLC v. Ruby Tuesday Inc.* reveals the U.S. court’s inclination to a narrow interpretation of *force majeure* clause.<sup>24</sup> While it may be generally required that a party demonstrate reasonable attempts to mitigate a *force majeure* effect, such a requirement is unlikely to be considered in some jurisdictions.<sup>25</sup> Therefore, what could give rise to an event of *force majeure* depends on particular contracts and jurisdiction. One must note that a *force majeure* clause cannot be implied or invoked into a contract, except as expressly provided by parties, and does not operate in void, on the assumption of default by unspecified events and under any principles of unwritten rules. Even when a *force majeure* has been provided in a contract without condition precedents or subsequent steps to be taken for it to be invoked, parties will ultimately have to face the machinery of litigation or arbitration, depending on which mode of dispute settlement they have agreed upon. If litigation is decided on, the court would be left to decide allocation. This decision may be a matter of jurisdictional bearing.<sup>26</sup>

The operating mechanism of a typical *force majeure* allows contracting parties to raise a defense for inordinate delay or inability to fulfill specified contractual obligations, if certain specified events take place.<sup>27</sup> That is to say, a party at whose end such eliciting events have occurred will be exculpated from a legitimate delay or non-performance of required obligations in interim. *Force majeure* does not completely freeze an existing binding contract, as in the case of frustration, but only

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19. (1953), 1 W.L.R. 280 (Can.) (holding that contractual clauses, which refer to a generic or variety of *force majeure* conditions, are void on the ground of uncertainty).

20. Logan Johnson & Benjamin Cohen, *Coronavirus and Force Majeure: Who is Liable?* SHJ LAW FIRM: INSIGHTS (March 4, 2020), <https://shjlawfirm.com/2020/03/04/coronavirus-and-force-majeure-who-is-liable/>.

21. 461 N.E.2d 1049, 1058 (1984).

22. See Johnson & Cohen, *supra* note 20.

23. See *id.*

24. See 88 A.D.3d 1224, 931 N.Y.S.2d 436 (N.Y. App. Div. 2011).

25. See HFW, *supra* note 7.

26. See Robert M. Finkel et al., *COVID-19: Drafting Force Majeure Clauses in Light of the COVID-19 Pandemic* (April 14, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200413-drafting-force-majeure-clauses-in-light-of-the-covid-19-pandemic>.

27. Johnson & Cohen, *supra* note 20.

operates to insulate parties from the breach of an obligation, effective within the duration of the *force majeure*. Therefore, in a contract for supply, parties may agree to defer contracted volumes of oil and gas until a return to normalcy. The problem with such an arrangement may revolve around invoicing or applicable pricing, which is whether the price during the actual delivery time or of the initial delivery date would apply.<sup>28</sup>

Though a *force majeure* event may last longer than a reasonably stipulated time, a right to terminate the contract is likely to be raised by either party.<sup>29</sup> There are possible outcomes to termination. First, termination ordinarily signifies there are no more obligations existing between either contracting parties.<sup>30</sup> Notwithstanding, a buyer may sometimes be required to renegotiate in good faith. In which case such terms and conditions upon which it would restart the product purchase at any time an alleged *force majeure* event ceases.<sup>31</sup> This post-termination contract renegotiation has been noted to be uncommon and nearly impossible.<sup>32</sup> Based on contractual reasonability and legitimacy, any right of termination within the context of a *force majeure* event is unlikely to avail where the parties did not agree from the onset that, at any point in time, either party can exercise the right of termination if a specified triggering event of *force majeure* endures longer than specified. One critical question now is: what happens in a scenario where the parties failed to address what should be, when an event of *force majeure* prolongs longer than as reasonably normal or stipulated? The very proximate alternative defenses for a party could be the common law doctrines of frustration and impracticability. These doctrines do not need to have been provided in existing contracts before a party can rely on them.<sup>33</sup>

## B. The Fundamentals of Force Majeure

### 1. Evidentiary eliciting event

The event of *force majeure* must be seen to have happened and also perceptible with consequential impacts. The impacts can considerably be massive to both human health and the economy. This suggests that contracting parties will not only be affected, but also a significant number of the population will be equally affected. Basically, an instrumental nexus between the failure to perform and a *force majeure* event is one of the underlying requisites, and such a causative event must be suitable within the meaning or scope of a specified *force majeure* clause. The standard rule on the burden of proving the nexus is arguably that of “he who alleges must prove.”<sup>34</sup> Thus, a party alleging *force majeure* must prove that: (i) an alleged

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28. See Ason & Meidan, *supra* note 16.

29. See *id.* See also HFW, *supra* note 7.

30. Ason & Meidan, *supra* note 16, at 3.

31. See *id.* at 3.

32. *Id.*

33. Jonathan Kelly, Jeffrey A. Rosenthal & Delphine Michot, *Cleary Gottlieb Discusses the Coronavirus: Force Majeure of Frustration?*, THE CLS BLUE SKY BLOG (March 2, 2020), <https://clsbluesky.law.columbia.edu/2020/03/02/cleary-gottlieb-discusses-the-coronavirus-force-majeure-or-frustration/#>.

34. HFW, *supra* note 7.

event of *force majeure* truly exists; (ii) the inability to perform is the sole cause of the event; (iii) it was not of the party's fault, responsibility and negligence; (iv) the *force majeure* is not within the party's control; and (v) the event cannot be avoided.<sup>35</sup> Generally, economic or financial privation and costs increase, which can frustrate performances that cannot stand for *force majeure*.

## 2. Rarity

*Force majeure* essentially constitutes incidents that are generally unusual in ordinary business contexts. This fact is one reason contracting parties cannot ordinarily contemplate any looming *force majeure* event, and also why such an event in most cases becomes controversial upon occurrence. The tendency of most draftsmen or lawyers reflects a perceived tactical approach to overcoming such a problematic issue; in which case, they have had to indirectly employ "*sui generis*" or "*ejusdem generis*" expressions to convey possible *force majeure* events into a general context of a *force majeure* clause needed in an agreement or contract.

## 3. Lack of prior foresight

The nature of *force majeure* is one that no man can foresee, even when human creativity is put into prospection to a proximate reasonability. This means such events are often unthinkable, and parties do not have the ability to contemplate them at any first instance during a contract formation, except that previous events of like nature and consequences could be reckoned as a basis for drafting a clausal *force majeure*. This makes for an assumption to argue that the timing or the stage at which a contract has been formed is crucial for a *force majeure* claim. The finality of a contract, in essence, is not because the contracting parties are not fallible, but of how infallible they are on any conceivable risks in the contract. Therefore, contracts are prone to uncertainty of risks, such as *force majeure*.

## 4. Chancy

Every *force majeure* is irrefutably presumed to be uncertain and risky. That is all the more reason no contracting party can envision its occurrence or allocate related risks into a business context during contractual negotiation, formation, or drafting. Because an occurrence of *force majeure* is always uncertain, it cannot lead to an attribution of responsibility to any of the parties, which is why a barrier to the performance of obligations in LNG SPAs must have a direct relationship with the *force majeure* event, for example. Therefore, contracting parties are not assumed to be responsible for an act of *force majeure* which either party is claiming.

## 5. Duty of care

The duty of care is fundamental to a *force majeure* claim. Thus, a party claiming *force majeure* defense is expected to have demonstrated a reasonably acceptable level of concern, or efforts to mitigate such an event, and accompanying consequences to the fullest extent possible.<sup>36</sup> The principle of which is for fair and

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35. *Id.*

36. *Id.*



equitable humanization of both parties' contractual obligations. This is further aimed at ensuring continuous performance without impedance, or, in any worst scenario, to resume normal performance in the shortest practicable time whenever a proven *force majeure* event is reconditioned.<sup>37</sup> The idea of duty of care is legally inherent in the contractual relationship between the contracting parties.

#### 6. Supernaturalism

The defining sequence of *force majeure* is embedded in Acts of God, with a mystical nature symbolic of supernaturalism. *Force majeure* events are usually atypical, unintentional, accidental, and naturally characterized by an element of automatism.<sup>38</sup> (This is why no human beings, including contracting parties, would have ordinarily premeditated or controlled the occurrence of a *force majeure* event.) The case *McWilliams v. Masterson*, offers a good illustration of the court's decision that an Act of God enmeshes from "natural forces," "events," or "causes."<sup>39</sup> Thus, most events of *force majeure* are bound to happen, but man is only able to manage the impacts of those events. One typical example is an earthquake, which is a natural disaster.

#### 7. Consensual *force majeure* provision

The operability and defense of *force majeure* is dictated and reinforced by parties' existing contractual terms. Effectively, *force majeure* does not operate in void, or under any principle of unwritten rules. Nevertheless, it is one thing to agree on what constitutes a *force majeure* event by parties, and another to fulfill any requisites for effectuating a claim thereto. Moreover, of particular concern is the fact that, although what constitutes triggering events may have been specifically stipulated, courts in different jurisdictions are most likely to lend a different approach to that understanding and interpretation. In most countries or jurisdictions, *force majeure* events are perceived and interpreted differently under different laws. To that degree, contracting parties have a responsibility to engage in meticulous inquiry into what *force majeure* events mean to particular local or national laws. The assumption that parties are expected to have common knowledge of a state's underlying laws when contracting in such a state was demonstrated in *Monroe Dearborn Ltd. Partnership v. Board of Education of City of Chicago*.<sup>39</sup>

#### 8. Formalization of condition precedent

Though parties may specifically provide certain triggering *force majeure* events, some condition precedents are usually required of a contracting party likely to raise a *force majeure* if unable to perform obligations. For example, giving formal

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37. See Ason & Meidan, *supra* note 16, at 3.

38. Janice M. Ryan, *Understanding Force Majeure Clauses*, VENABLE LLP (Feb. 2011) <https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses> (The use of automatism to refer to one of underlying fundamentals of *force majeure* event is simply suggestive of non-deliberate, unintentional, and uncontrollable nature of such event by contracting parties).

39. See *McWilliams*, 112 S.W.3d 314, 320 (Tex. App. 2003).

39. See *Monroe*, 648 N.E.2d 1055, 1058 (Ill. App. 3d 1995) (recognizing the importance of the parties' contractual intentions and language when they entered into an agreement); see also Johnson & Cohen, *supra* note 20.

notice is one such typical condition.<sup>40</sup> The decision as to whether an alleged *force majeure* event, or related consequences, has actually begun is time-sensitive in relation to giving notice. There has been one argument that notice is sometimes given within a relatively little space from the time of occurrence.<sup>41</sup> This problematic issue could be a bottleneck to a COVID-19 *force majeure* claim,<sup>42</sup> but one can argue that the right time to issue a notice for invoking a *force majeure* clause amid COVID-19 begins when either contracting party was practically incapable, either logistically or otherwise, to perform obligations as a result of government lockdown orders or related policies and regulations.

The court in *Sherwin Alumina L.P. v. Aluchem Inc.*,<sup>43</sup> held that declaring a *force majeure* for a yet to be compelled shutdown of a facility, with no discussion on solutions initiated by the contracting parties, was unacceptable. Most *force majeure* clauses impose particular obligations other than the general requirements for notice and mitigation effort.<sup>44</sup> For example, an obligation to buy reduced volumes in the event of *force majeure* may be imposed on a buyer in SPAs, or the buyer should make reasonable efforts to warrant acceptance of product delivery at any terminal not impacted by such an event.<sup>45</sup> It may be provided that no unexpected overheads shall be suffered, or commercially uninformed difficulty experienced by the buyer in a bid to overwhelm the event of *force majeure*.<sup>46</sup> At the end of *force majeure*, the buyer may be required to reinstate the overall volume contracted by using reasonable efforts to take up products already justified under a *force majeure* event in subsequent contract years. However, some contracts may require a seller to sell the impacted product to a third party for the time being of the *force majeure*.<sup>47</sup> Overall, the failure to fulfill laid down conditions to effectuate a defense of *force majeure* cannot hold any water, even in a clear face of prescribed *force majeure*, as it is a contractual tradition to keep or observe contractual terms.

### III. Current Debates About Force Majeure Amid COVID-19

Emerging debates concerning whether COVID-19 is an acceptable, legitimate reason to raise a *force majeure* defense significantly vary. These debates relatively draw inferences from different premises that tend to focus mainly on one side of an argument without considering whether COVID-19 is a classical *force majeure* instance for LNG contracts, PPAs, or EPAs by implication before reflecting its possible crystallizing elements. The major building blocks of the current arguments encompass: (a) the language or wording of a contract for which a *force majeure* due to COVID-19 can be raised; (b) whether a *force majeure* provision is

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40. See Ason & Meidan, *supra* note 16, at 2–3.

41. Drea Schmidt & Claire Brown, *Is Covid-19 Force Majeure in a Commercial Contract?*, Tonkon Torp LLP, <https://tonkon.com/alerts/2020-03-24/is-covid-19-force-majeure-in-a-commercial-contract.html> (last visited March 25, 2020).

42. *Id.* at 35.

43. *Aluchem, Inc. v. Sherwin Alumina, L.P.*, No. C-06-183, 2007 WL 1100473 (S.D. Tex. Apr. 11, 2007).

44. Ason & Meidan, *supra* note 16, at 2.

45. *Id.*

46. *Id.*

47. *Id.*

even contained in the contract; (c) whether reasons for excusing performance include a pandemic or related concept; and (d) whether a requirement for contractual notice was provided in the contract and has been met.<sup>48</sup>

Further arguments suggest that concerns about non-performance of obligations due to COVID-19, and resultant impacts, must be analyzed solely on the basis of the specific contractual language of a contract's *force majeure* clause. Moreover, it has been argued that general explanatory conventions will be utilized to interpret such provisions based on applicable law.<sup>49</sup> On a more categorical note, another article suggests that COVID-19 *per se* is unlikely to be an instance of *force majeure*.<sup>50</sup> This article somewhat fell back to earlier debates about the contractual language used and failed to explain what such language could be used for COVID-19 to become a classified *force majeure* in energy contracts, such as SPAs. Similarly, it argued that courts might consider containment actions taken by the government in response to COVID-19 as a *force majeure* event instead of the virus itself.<sup>51</sup> This suggestion possibly implies that a governmental action is not considered a *force majeure* event, either independently or together with the pandemic, and might not avail of a contracting party declaring it a success. On this basis, it becomes needful for parties to always consider associated government actions, responses, policies, or regulations as constituents of *force majeure*. Though a lack of consideration may not necessarily rob parties of a defense if reasonable facts exist, to believe that governmental actions have become an impedance to the performance of existing contractual obligations entered into by parties.

At the core of every argument should be whether COVID-19 is originally, by itself and on face value, a constituent of a *force majeure* event in energy SPAs. This is because parties in a contract might have provided for a particular event that, in reality, lacks the most typically required causal fundamentals of *force majeure*, which otherwise cannot stand the logic of the *force majeure* test. Furthermore, a contract entered into by parties during the COVID-19 pandemic, is unlikely to prevail because it will not be an unforeseen event.

However, this article takes a different path and contrary view unlike other studies. Ultimately, it argues that COVID-19 is a good supervening instance of *force majeure* in energy SPAs, such as an LNG contract. The pandemic was an unforeseen event prior to its outbreak, and parties would not have ordinarily expected or foreseen it. The WHO, which declared 2019-n-CoV unknown to humanity until it was discovered in Wuhan, China, has reinforced the fact of "unforeseen circumstance" to be fundamental to any legitimate *force majeure* claim.<sup>52</sup> Not only does containing COVID-19 fall outside any parties' control, but also a curable vaccine for the pandemic is well outside mainstream scientific understanding. Furthermore, many

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48. See Michael W. O'Donnell & Aimeé Vidaurri, *Critical issues facing essential suppliers in the COVID-19 pandemic* (April 2, 2020), available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/049b6458/critical-issues-facing-essential-suppliers>; Brain Perrott, *Coronavirus: Can it be a Force Majeure Event?* February 2020, available at: <https://www.hfw.com/Coronavirus-Can-it-be-a-Force-Majeure-event-Feb-2020>.

49. Johnson & Cohen, *supra* note 20.

50. HFW, *supra* note 7.

51. *Id.*

52. WHO, *supra* note 3.

containment policies and “flattening the curve” efforts of various governments in different countries do not allow for the fundamental rules of free capitalism and are capable of undermining existing business relationships. These efforts are also outside of the control of individual parties.

The above argument is central to understanding whether COVID-19 is typically a *force majeure* event by origin, nature, or kind. However, it is more important to understand what conditions need to be available and satisfied in typical energy contracts, as indicated above, before either contracting parties can invoke the pandemic as a *force majeure*. Gaining insights from current debates, the most crucial consideration is whether the parties had provided a *force majeure* clause in their existing energy contracts. In principle, it is one thing to incorporate a *force majeure* clause in a contract and another to prove the specific event in question. Draftsmen or lawyers, depending on levels of expertise and knowledge of contract negotiations, have taken different approaches to *force majeure* clauses. Typically, it can be seen that general or transverse words are employed to convey similar interpretations of *force majeure* events. This approach could be problematic at any time a dispute arises, as to whether or not a particular triggering event constitutes *force majeure*. Though it is likely to be disputed, a *force majeure* clause specifying a particular event with accompanying *sui generis* or *ejusdem generis* phrases can still be interpreted to fall within that context, if of the same nature, class, and characteristics.<sup>53</sup> Due to increasing uncertainties and disputes over the *sui generis* or *ejusdem generis* *force majeure* clauses, parties are now more careful with issues when negotiating and entering into any energy contracts. Additionally, draftsmen and lawyers have taken a similar position. Therefore, more specific mentions of unforeseeable *force majeure* events can be seen to have been cut from most existing contracts. To that effect, a prospect exists for COVID-19 to qualify as a *force majeure* event in some existing energy contracts, like LNG SPAs, that specifically incorporated “pandemics.”

#### IV. The Implications of *Force Majeure* on Energy Law and Energy Contracts

The need to contain the COVID-19 pandemic by various governments has triggered political, legal, and regulatory developments worldwide, which is especially notable in the health and economic sectors.<sup>54</sup> The insurance industry is also included. Legislators in many states are now considering and proposing laws capable of bringing statutory changes to compel industry insurers to offer “retroactive coverage to policyholders,” irrespective of the insurance language used.<sup>55</sup> These kinds of laws may be highly subject to a dispute of legality, as retroactive laws rarely permeate legal validity. Most governments have either enacted new laws and regulations, or amended existing ones, on an emergency

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53. See *Kel Kim Corp. v. Central Markets, Inc.*, 131 A.D.2d 947 (N.Y. App. Div.) (1987).

54. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-36, 134 Stat. 281 (2020); The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350 (Eng.); The Delhi Epidemic Diseases, COVID-19 Regulations 2020 (Mar. 3, 2020); The Quarantine Act (2020) Cap. (Q2 L.F.N 2004), (Nigeria); Circular, Central Bank of Nigeria, CBN Policy Measures in Response to COVID-19 Outbreak and Spillovers (Mar. 16, 2020).

55. Michael Wray, et al., COVID-19: BUSINESS INTERRUPTION CLAIMS IN A GLOBAL PANDEMIC, HFW, <https://www.hfw.com/COVID-19-Business-Interruption-Claims-in-a-Global-Pandemic-US-May-2020>.

basis.<sup>56</sup> Currently, emerging research focuses essentially on the economic effects, impacts of short-term mitigation, and containment strategies of the pandemic;<sup>57</sup> with a focus on tracing likely impacts to similar historic country- or regional-specific events and local results in a period of not more than a decade.<sup>58</sup>

There is no doubt that the legal and regulatory framework development in response to COVID-19 will mean changes and challenges to existing businesses. The challenges in particular will involve some sort of legal disputes and financial risks, for which many businesses, including governments, will have to face. While the energy sector has not suddenly become receptive to any detectable legal and regulatory developments in terms of changes to energy laws and contracts, such developments will arguably surface. This prospect will be fundamentally driven by the ongoing debates over *force majeure* legitimacy, as this has currently become instrumental to emerging disputes over similar subjects.<sup>59</sup> To that effect, international oil and gas companies, contracting parties, businesses, and host governments, will all need to address critical issues being raised with respect to COVID-19 pandemic-induced *force majeure* events and any other related adverse impacts on businesses and investments. There are more contractual concerns likely to inspire energy laws and policy development, which will also recondition some energy SPAs. Therefore, it is reasoned that pandemic-induced *force majeure* will, now more than ever, come to the cusp of energy laws and contracts in near future, especially as research institutions, organizations, and governments engage in large-scale research on all aspects and ramifications of COVID-19.

Renegotiation of existing energy SPAs, such as LNG contracts and PPAs is likely. Because emergency changes to national laws and policy frameworks are next, energy resource sector stakeholders may opt to mutual redress of certain contractual concerns consequent upon COVID-19. For example, it has been argued that “future revisions to contractual terms” and the possibility for price renegotiations are now anticipated because of resultant *force majeure* claims.<sup>60</sup> The renegotiations will be crucial for the allocation of risks and prevention of possible litigation. Reports on diversions of many cargoes from China and stranded LNG vessels off the coast of China suggest apparent implications for future energy contracts, such as inspiring flexible destination clauses for potential LNG supply contracts.<sup>61</sup> This seems to be happening already to most contracts with Chinese parties – as parties have

56. See CARES Act, *supra* note 55.

57. Sergio Correia et al., *Pandemics Depress the Economy, Public Health Interventions Do Not: Evidence from the 1918 Flu* (2020), <http://dx.doi.org/10.2139/ssrn.3561560>.

58. Óscar Jordà et al., *Long-run Economic Consequences of Pandemics*, 2020, NBER Working Paper 26934, available at <https://www.nber.org/papers/w26934.pdf>.

59. Complaint, SCGM, Inc. d/b/a Star Cinema Grill, Hollywood Palms Cinema, Dist. Theater, and State Restaurant, Plaintiff, v. Certain Underwriters at Lloyd's, Defendant, 2020 WL 1683973 (The lawsuit recently filed by SCGM Inc., in the United States District Court for the Southern District of Texas, on 3 April 2020 has already become a source of potential controversy over COVID-19 pandemic event-related *force majeure*.)

60. Ason & Meidan, *supra* note 16.

61. Jessica Jaganathan, *Virus outbreak knocks four Asia-bound LNG tankers off course- sources*, REUTERS, (Feb. 13, 2020, 2:31 AM.), <https://www.reuters.com/article/us-china-health-lng-tankers-virus-outbreak-knocks-four-asia-bound-lng-tankers-off-course-sources-idUSKBN20712G>.

demonstrated interest in renegotiating a second option for the delivery route.<sup>62</sup> The unprecedented low demand for crude oil in the first quarter of 2020, which led to hundreds of stranded oil laden ships without anywhere to disembark and is consequently accruing roughly \$30,000 daily, has necessitated an urgent concern for energy storage.<sup>63</sup> The current reality shows that energy storage is one aspect of energy management and security that has lacked adequate legal and regulatory attention and literature.<sup>64</sup> The impacts of COVID-19 will arguably change on such a backdrop. Many countries will very soon rise up to energy storage concern and make it a centrality of energy law and policy.

Remarkably, however, the financial and legal risk challenges of COVID-19 have currently manifested. There are reasons to think that crises trigger inevitable disputes, and COVID-19 is not an exempt to that context.<sup>65</sup> The energy sector is not immune to pandemic-induced crises. This reality is likely to give rise to investment claims,<sup>66</sup> which can be of different proportions. For instance, the emerging COVID-19 crisis regarding increasing *force majeure* claims are chiefly linked to energy- or petroleum-related disputes, which in part have become an entry point into underway litigations and cases yet to come. The China National Offshore Oil Corporation (“CNOOC”), a major international LNG importer, recently invoked *force majeure* notices on cargoes, as a result of “quarantines and travel restrictions” by the Chinese government in major parts of China to curtail the COVID-19 rise.<sup>67</sup> There are more LNG dealers, such as Trafigura and Middle East Gas, that have purportedly issued similar *force majeure* notices not formally established yet.<sup>68</sup> Additionally, at least one LNG supplier has received a *force majeure* notice from PetroChina.<sup>69</sup> The notices have been backed by *force majeure* certificates issued by the China Council for the Promotion of International Trade (“CCPIT”) and were rejected by companies including Total, Shell, and Qatargas.<sup>70</sup> This development can be seen as having moved new Chinese buyers to consider *force majeure* alternatives.<sup>71</sup> The CCPIT

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62. *Id.*

63. Lucia Kassai & Andres Guerra Luz, *America's Biggest Oil Storage Hub Is Filling to the Brim Again*, BLOOMBERG (November 20, 2020), <https://www.bloomberg.com/news/articles/2020-11-20/america-s-biggest-oil-storage-hub-is-filling-to-the-brim-again>.

64. Louise Dalton, *CMS Expert Guide to energy storage regulation*, CMS LAW TAX (April 24, 2018), <https://cms.law/en/int/expert-guides/cms-expert-guide-to-energy-storage>.

65. Alcolea, *supra* note 6.

66. J.P. Moyano Garcia, *Customary Law Defences Against COVID-19 Investment Claims*, TDM, June 2020, forthcoming, [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com).

67. Ason & Meidan, *supra* note 16.

68. Cindy Liang, *Analysis: LNG market turmoil to worsen as coronavirus impact deepens* (February 10, 2020), <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/021020-lng-market-turmoil-to-worsen-as-coronavirus-impact-deepens>

69. Chen Aizhu & Jessica Jaganathan, *Exclusive: China's top gas importer PetroChina declares force majeure on imports-sources* (March 5, 2020), <https://www.reuters.com/article/us-petrochina-gas-exclusive/exclusive-chinas-top-gas-importer-petrochina-declares-force-majeure-on-imports-sources-idUSKBN20S10W>.

70. LNG World News, *Poten: Coronavirus muddles LNG market, Chinese LNG imports* (February 14, 2020), <https://www.offshore-energy.biz/poten-coronavirus-muddles-lng-market-chinese-lng-import/>.

71. Cindy Liang, *China's CNOOC declares force majeure on LNG contracts amid coronavirus outbreak* (February 6, 2020), <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/020620-chinas-cnooc-declares-force-majeure-on-lng-contracts-amid-coronavirus-outbreak/>.

issued initial *force majeure* certificates on February 2, 2020 for the COVID-19 pandemic and has issued a total of 4,811 certificates as of March 3, 2020.<sup>72</sup> There is no doubt as to whether contracting parties will gradually declare more *force majeure* clauses.

The episodic volatility of the global energy market has exposed major stakeholders to the vulnerability of the financial crisis caused by COVID-19. There are many countries, especially developing countries, and investor companies reporting huge financial losses.<sup>73</sup> This has been particularly due to the poor demand for crude oil, specifically on Monday, April 20, 2020, a historically bad day for the episodic rise and fall of crude oil prices. The low demand for crude oil has inversely affected some allied energy products as a recent report states that the competitiveness of ethanol in Brazil has been lost to lower prices of gasoline.<sup>74</sup> The relatively over-dependence of most countries on crude oil exports as a major source of revenue for national budgets, notably in developing African countries such as Nigeria, Angola, and Algeria, means that these countries are facing both the health and financial impacts of COVID-19.<sup>75</sup> Generally, the COVID-19 reality reveals high uncertainty about the future of energy sector-based hydrocarbons around the world. This scenario has prompted some companies to instantly cut down their capital expenditure (“CapEx”) and operational expenditure (“OpEx”).<sup>76</sup> Although the financial impacts of the pandemic may be short-term for existing petroleum contracts, depending on when the world is able to contain the pandemic, contracts reopening for renegotiation of prices and terms may begin sooner than later. The possibility is expectedly visible.

Moreover, it is possible to feel COVID-19 impacts across the entire natural resources sector and pointedly in the upstream, mid-stream, and downstream energy sectors. To put it in a specific perspective, existing energy projects and services, such as production contracts, supply chains-related contracts, and refining, can be halted in the interim or during the currency of the pandemic, perhaps from a *force majeure* context. A recent article by Chris Smith, has envisaged a possibility for sealing off productive wells and the impairment of commitments for exploration licenses and production sharing contracts (“PSCs”) due to the “suspension of exploration and development operations.”<sup>77</sup> Chris Smith also revealed that some projects have

72. CCPIT, *CCPIT Provides COVID-19 Force Majeure Certificates and Other Services* (March 13, 2020), [http://en.ccpit.org/info/info\\_40288117668b3d9b0170d2952a7f0799.html](http://en.ccpit.org/info/info_40288117668b3d9b0170d2952a7f0799.html).

73. Ovunc Kutlu, *Oil giants' loss exceed \$20B in 1Q20 due to coronavirus*, ANADOLU AGENCY (May 22, 2020), <https://www.aa.com.tr/en/economy/oil-giants-loss-exceed-20b-in-1q20-due-to-coronavirus/1850337>.

74. Vinicius Fontana & Sarita Reed, *COVID-19 hits ethanol industry in Brazil*, DIÁLOGO CHINO (May 27, 2020), <https://dialogochino.net/en/agriculture/35641-covid-19-hits-ethanol-industry-in-brazil/>.

75. Camilla Rocca & Ben Chandler, *COVID-19 and Africa's Energy Sector: A Case for Starting Anew?* (2020), <https://mo.ibrahim.foundation/sites/default/files/2020-05/covid-19-and-africas-energy-sector.pdf>.

76. Deloitte, *COVID-19's impact on oil, gas, and chemicals organizations* (April 1, 2020), <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/covid-19/covid-19-s-impact-on-oil--gas--and-chemical-organizations.html>.

77. Chris Smith, *The impact of COVID-19 on the energy & natural resources sector* (March 27, 2020), [https://www.quadrantchambers.com/sites/default/files/media/document/the\\_impact\\_of\\_covid-19\\_on\\_the\\_energy\\_natural\\_resources\\_sector\\_-\\_chris\\_smith\\_qc.pdf](https://www.quadrantchambers.com/sites/default/files/media/document/the_impact_of_covid-19_on_the_energy_natural_resources_sector_-_chris_smith_qc.pdf).

already been announced for suspension from the coast of Gambia.<sup>78</sup> Further research demonstrates that the electricity sector is currently facing COVID-19 impacts and has led to a revision of load forecasts.<sup>79</sup> Additionally, most renewable energy projects have been impacted,<sup>80</sup> as project delays are expected, especially as China is a global key player in photovoltaic (“PV”) panels, and turbine production is in total lockdown.<sup>81</sup> There are increasing reports on the loss of jobs in the energy sector. One report reveals that thousands of clean energy personnel have been laid off in the U.S., and more are anticipated while the pandemic persists.<sup>82</sup> Largely, energy companies are being put under pressure to adapt to COVID-19 regulatory responses, by trying to provide their workforce with health and safety protocols.<sup>83</sup> The refining case scenario could be a disaster for countries that depend on the re-importation process, such as Nigeria, whose crude oil can only be transformed into a usable economic product by this process. Demonstrably, if a country such as Nigeria is unable to export its crude oil for refinement and re-importation for local use because of the COVID-19 containment lockdown measures of overseas governments, especially in countries where such refinement is usually done, a critical sector like the electricity sector can be adversely impacted.<sup>84</sup> Such an impact would perhaps mean a far-reaching economic doom for the overall economic functioning and survival of the citizens. The impact may be short-term, depending on how long the pandemic lasts. Currently, no new investment deals or interest from investors can be anticipated anywhere.

Whereas the impacts of COVID-19 have proven to be extremely harmful to humanity, what is beneficial about the pandemic reflects a detectable deceleration of greenhouse gas emissions (“GHGs”).<sup>85</sup> Evidence indicates that low demand for hydrocarbon fuel and accompanying minimal economic activities, especially in intensive hydrocarbon consuming industries, including production and transportation, in response to lockdown measures have resulted in obvious progress

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78. *Id.*

79. Don C Smith, *COVID-19 and the energy and natural resources sectors: little room for error*, 38 J. OF ENERGY & NAT. RESOURCES L. 125 (2020).

80. Parveen Arora & Shloka Vaidialingam, *Impact of COVID-19 on Energy Sector: Recent Government Notifications and Initiatives* (May 5, 2020), <https://www.mondaq.com/india/renewables/928680/impact-of-covid-19-on-energy-sector-recent-government-notifications-and-initiatives>.

81. Norton Rose Fulbright, *The Impact of COVID-19 on the Power and Renewables Industry*, (March 2020), <https://www.nortonrosefulbright.com/de-de/wissen/publications/be467bc7/the-impact-of-covid-19-on-the-power-and-renewables-industry>; Kaushik Das, *Impact of COVID 19 Pandemic into Solar Energy Generation Sector* (Apr. 20, 2020), <http://dx.doi.org/10.2139/ssrn.3580341>.

82. Laura Shields, *COVID-19 Slows the Clean Energy Workforce*, THE NCSL BLOG (May 5, 2020), <https://www.ncsl.org/blog/2020/05/05/covid-19-slows-the-clean-energy-workforce.aspx>.

83. Sharon Singh et al., *Environmental and Regulatory Compliance Issues for the Natural Resources Sectors During COVID-19*, BENNETT JONES (Mar. 25, 2020), <https://www.bennettjones.com/Blogs-Section/Environmental-and-Regulatory-Compliance-Issues-for-the-Natural-Resources-Sectors-during-COVID-19>.

84. Cosmos Nike Nwedu, *Will a Transition to Renewable Energy Promote Energy Security Amid Energy Crisis in Nigeria*, in *ENERGY TRANSITIONS AND THE FUTURE OF AFRICAN ENERGY SECTOR: LAW, POLICY AND GOVERNANCE* 231-263 (VR Nalule ed., Palgrave, 2020).

85. Corinne Le Quéré et al., *Temporary reduction in daily global Co emissions during the COVID-19 forced confinement*, NAT. CLIM. CHANG. 10, 647-653 (2020), <https://www.nature.com/articles/s41558-020-0797-x>.



in emission reduction efforts for the first time.<sup>86</sup> There has been an improvement in air quality, according to the most recent literature.<sup>87</sup> Therefore, it appears that this disruption in the global economy may be good for the climate and potentially even for humanity. This offers a prospect for an energy transition, with a promising solution for the energy sector and wider economy-based decarbonization.<sup>88</sup> There is a possibility for most countries or governments to be inspired to re-strategize and move critical investment decisions from conventional energy resources to clean, modern energy resources and technologies amid COVID-19 and the ongoing uncertainty in the global oil market.

Felix Horne, in a recent interview, revealed a COVID-19 scenario as an opportunity to welcome clean energy.<sup>89</sup> This opportunity will accelerate the energy transition. However, the fact that the pandemic represents an opportunity to fight global climate change has been described as both undesirable and unsustainable, not only because it is a scenario with a high death toll, but it is not a long-term solution.<sup>90</sup> Equally, post-pandemic long-term economic recession is expected and will result in a more measurable progress in carbon emission reduction; however, it can still limit progress needed for innovative technological development for long-term sustainable progress towards climate change mitigation and green growth economic migration, such as subsidizing fossil fuels, relaxing bans on coal mining, lowering vehicle emission standards, and removing taxes on high polluting undertakings.<sup>91</sup>

The perceivable negative impacts could also lead to prioritizing fossil fuels by relaxing regulations on gas flaring. This could also slow progress on environmental policies and more policy priorities desirable for limiting carbon emissions, possibly as a result of a substantial investment stimulus package for fossil fuel infrastructure.<sup>92</sup> More interestingly, the possible need for economic revival and job restoration after the COVID-19 chaos may lead to ignoring the nationally determined contributions (“NDCs”) to climate change mitigation by many countries, and instead focus on capital-intensive economic projects tending to cause more harm to the global climate.<sup>93</sup> This kind of economic development scenario will be mostly seen in developing countries heavily dependent on oil and gas resources. Energy resource diversification into renewables may, in some contexts, present a good

86. *Id.* [This article was drafted before current evidence indicated that GHG emissions were not as significantly impacted as projected. Eds.]

87. Manuel A. Zambrano-Monserrate et al., *Indirect effects of COVID-19 on the environment*, 728 SCI. OF THE TOTAL ENV'T 138813 (2020); Liane Yuri Kondo Nakada & Rodrigo Custodio Urban, *COVID-19 pandemic: Impacts on the air quality during the partial lockdown in São Paulo state, Brazil*, 730 SCI. OF THE TOTAL ENV'T 139087 (2020).

88. Cosmos N. Nwedu, and Solomon A. Alo, *Force Majeure in Post COVID-19: The Implication for Future Energy Law Contracts*, 1.2 GLOB. ENERGY L. AND SUSTAINABILITY 179-182 (forthcoming 2020).

89. Felix Horne, *Can COVID-19 Help Ease the Climate Crisis?*, HUMAN RIGHTS WATCH, May 2020, <https://www.hrw.org/news/2020/05/22/can-covid-19-help-ease-climate-crisis>.

90. Chukwumerije Okereke, *COVID-19 Presents Opportunity to End Gas Flaring*, <https://allafrica.com/stories/202005260193.html> (May 26, 2020).

91. *Id.*

92. Michal Meidan, *China Day 2020 summary: Geopolitical shifts and China's energy policy priorities*, 2 THE OXFORD INST. FOR ENERGY STUD. (March 2020).

93. Okereke, *supra* note 91.

alternative to fostering any desire to restore jobs and economies without putting humanity back on increasing carbon footprints.

### V. Conclusion

The global impacts of COVID-19 have spared no economic sectors or human health. Beyond its chaos in socio-economic and political activities worldwide, the increasing death tolls, alongside the growing number of new index cases globally, raises a serious future concern with no universally approved vaccine yet available to slow the spread.<sup>94</sup> Even as progress is being recorded nearly across the world, in which case many countries are gradually relaxing and phasing out their containment lockdown orders, it is still not clear where humanity is moving in terms of a total containment of the pandemic. At the time this article is written, confidence is in a short imagination, and the future is bleak. The truth is simple: so long as no curable vaccine is available, humanity is heading to an uncertain post-COVID-19 future. This is because a possibility exists for reoccurrence and relapsing of the pandemic after full remission. Even with vaccine trials now, the time it will get to the general public will still greatly impact the economy. Therefore, countries or governments globally will need to take cautionary approaches to moving back to fully open economies. Most importantly, transportation, especially transnational transportation, needs be diligently monitored, since it is one major means of diffusing the virus.

The challenges ahead of COVID-19, apart from those humanity is currently facing, may be quite enormous and far-reaching. The major challenge will certainly involve economic rebooting and having to restore lost businesses and jobs. This expected trend can undeniably trigger political, legal, and regulatory developments that are currently happening and changes for new and existing projects. The energy sector will not be spared. The need for oil and gas contract renegotiation is highly anticipated. Draftsmen, lawyers, international petroleum companies, oil and gas parties, and host governments will have to give greater attention to pandemic-related *force majeure* events in future energy laws and energy contracts, such as LNG SPAs and PPAs. The energy sector post-COVID-19 will be prone to large-scale arbitrations with less litigations, but contract reopening and renegotiations in good faith can bring a prospect for parties to avert such legal face-off, knowing that it can also trigger disputes if unilateral.

Lending the experience of COVID-19 so far, one can believe that conventional energy resources will continue to head to an ever-increasing future uncertainty. Moreover, it can be argued that a just energy transition less dependent on conventional energy is as promising as a solution towards a pathway for aggressive decarbonization, even though subsequent sharp rebound of emissions is possible in such a case. This is evident as the COVID-19-induced-low demand for

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94. See WHO, Coronavirus disease (COVID-19): Vaccines (October 28, 2020) [https://www.who.int/news-room/q-a-detail/coronavirus-disease-\(covid-19\)-vaccines](https://www.who.int/news-room/q-a-detail/coronavirus-disease-(covid-19)-vaccines) (The reality as on December 12, 2020, indicated that no globally authorized COVID-19 vaccine existed. The WHO has stated that three vaccines are currently being used within the authoritative bounds of national regulation and none including Moderna and AstraZeneca have received WHO EUL/PQ authorization, however, the Pfizer/BioNTech mRNA vaccine is to be assessed by December end).

conventional fuels and slower progress in economic activities globally has, for the first time in human history, recorded a clearly detectable and measurable decrease in GHGs.<sup>95</sup> Therefore, combining current instructive experience and future risk challenges of COVID-19 simply means that the world needs to get prepared without much protest. Overall, this article has implications for pushing the knowledge frontier of *force majeure* and lending a forward-looking approach to drafting future energy contracts, as draftsmen and parties will need to address specific pandemic-related *force majeure* events.

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95. Le Quéré et al. *supra* note 86.